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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. RIGOBERTO ALBOR, Defendant and Appellant.	E064672 (Super.Ct.No. RIF1203368) OPINION

APPEAL from the Superior Court of Riverside County. Michael B. Donner and Mac R. Fisher, Judges. Reversed in part; affirmed in part with directions.

Carl Fabian, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris and Xavier Becerra, Attorneys General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Scott C. Taylor and Charles C. Ragland, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Rigoberto Albor arranged to meet Rudy D.[1] on a street in Moreno Valley to sell him methamphetamine. When they arrived, Rudy gave defendant the money and defendant handed him the drugs. Rudy was upset about the amount of drugs and they got into a dispute. Defendant pulled a gun on Rudy and shot him in the chest. Prior to defendant's trial, he called his brother from jail and advised him to contact Rudy to tell him to tell the "truth" when he testified at defendant's trial.

Defendant was convicted in a first trial of dissuading a witness from testifying and being a felon addicted to narcotics in possession of a firearm. In a second trial, the jury found him guilty of the attempted, premeditated and deliberate murder of Rudy along with two enhancements involving the use of a firearm causing great bodily injury.

Defendant makes the following claims on appeal:

1. Insufficient evidence was presented to support defendant's conviction in his first trial of dissuading a witness to testify at trial within the meaning of Penal Code section 136.1, subdivision (a)(1).[2]

2. He received ineffective assistance of counsel based on his counsel's concession of defendant's guilt on the dissuading a witness charge in the first trial.

3. The trial court improperly modified the standard instruction in CALCRIM No. 2622 for dissuading a witness.

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[1] California Rules of Court, rule 8.90.

[2] All further statutory references are to the Penal Code unless otherwise indicated.

4. His counsel rendered ineffective assistance of counsel by (1) stipulating at the second trial that he had been found guilty in a prior proceeding of dissuading Rudy not to testify against him, and that defendant had been convicted of possession of a firearm by a felon; and (2) by failing to request a limiting instruction on the relevance of the prior jury findings.

5. The true finding on the section 12022.7 great bodily injury enhancement must be stricken because it is a lesser included enhancement of section 12022.53, subdivision (d).

6. Section 654 required that the trial court stay the sentence on his felon in possession of a firearm charge.

7. The trial court should have inquired further as to whether defendant wanted to replace retained counsel prior to sentencing.

FACTUAL AND PROCEDURAL HISTORY

A. PROCEDURAL HISTORY

Defendant was charged by the Riverside County District Attorney's Office with the attempted premeditated, deliberate and willful murder of Rudy D. (§§ 664, 187, subd. (a); count 1). It was additionally alleged as to count 1 that he personally and intentionally discharged a firearm causing great bodily injury (GBI) or death within the meaning of section 12022.53, subdivision (d), and personally inflicted GBI within the meaning of section 12022.7, subdivision (a). In count 2, defendant was charged with being a felon addicted to drugs in possession of a firearm (§ 29800, subd. (a)(1)); and in count 3 he was charged with preventing or dissuading a witness from attending and giving testimony at a

trial (§ 136.1, subd. (a)(1)). It was further alleged as to all counts that defendant served five prior prison terms (§ 667.5, subd. (b)).

On October 11, 2013, defendant was found guilty of counts 2 and 3 at a first trial. On September 1, 2015, after a second trial, defendant was found guilty of attempted premeditated and deliberate murder and the jury found the GBI allegations true. In a bifurcated proceeding, defendant admitted he had suffered the five prior convictions for which he served prison terms.

Defendant was sentenced to three years on count 2 and two years on count 3. He was sentenced to five years for the prior convictions. On count 1, he received an indeterminate sentence of 7 years to life, plus 25 years to life on the section 12022.53, subdivision (d) enhancement, plus 3 years to life on the section 12022.7 enhancement, for a total of 35 years to life. Defendant received a total sentence of 35 years to life plus 10 years.

B. FACTUAL HISTORY

1. *FIRST TRIAL*

On July 1, 2012, Christina L.[3] and defendant had been at a shop owned by their friend A.R. They stayed up all night taking methamphetamine. The next day, defendant, Christina and A.R. entered A.R.'s truck. They drove to Moreno Valley and parked the truck on War Admiral Street. Another car pulled up behind them. The occupants of the other car were Rudy and a person she knew as Tyson B. She had previously sold drugs

[3] Christina had prior convictions of burglary and narcotics possession.

to Rudy. Christina, defendant and A.R. all exited the truck. Rudy and defendant entered the truck to exchange the drugs for money.

Rudy and defendant exited the truck. The conversation between defendant and Rudy got heated. Rudy was unhappy about the amount of drugs that defendant sold him but defendant assured him he would bring him more later. Christina observed Rudy look like he was going to take a swing at defendant. Christina got nervous and looked away. She yelled at defendant and A.R. that they needed to leave. Before defendant and A.R. came back to the truck, Christina heard a loud noise that sounded like a gunshot.

Defendant and A.R. returned to the truck. Defendant said, "We gotta go." They drove away. They drove to Christina's friend's house in Beaumont. While they were driving, defendant said "I think I shot that fool in the neck." Defendant seemed surprised that he had shot him. Christina did not see defendant with a gun in the truck. Christina had seen defendant with a gun in the past but not on that day. Christina did not think that defendant shot Rudy because after the gunshot she looked in the rearview mirror and Rudy was still standing.

Christina identified all of the participants—defendant, Tyson, Rudy and A.R.—from photographic lineups shown to her prior to trial. Christina had seen a gun at A.R.'s shop earlier that day; she believed it belonged to A.R.

Hailey Hermanson lived on War Admiral Street in Moreno Valley on July 2, 2012. On that day, she was walking to her car, which was parked in her driveway, when she observed two vehicles parked across the street that she did not recognize as belonging to any of her neighbors. One appeared to be a "low rider" truck. There was a man and a

woman in the truck. She believed the other vehicle contained two males. Hermanson entered her car and heard a "pop." Both vehicles drove away. She never saw a gun.

A.R. was in custody in state prison for drug offenses. A.R. admitted being with defendant and Christina on July 2. They all drove in his truck to meet someone. Defendant was driving. They parked by a dark, small car. A.R. talked to the driver; he did not know the driver. Defendant went to talk to "Rudy." A.R. did not recall that he then heard a "pop" sound. They drove away. A.R. never saw defendant with a gun that day.

Rudy acknowledged that on July 2, he was shot in the chest. The bullet lodged in his chest and could not be removed because it was too dangerous. He was in the hospital for seven days.

On July 2, Rudy had been standing on the street in Moreno Valley. A person he did not know exited a truck and asked if he was Rudy. The person shot him in the chest and left. Rudy's friend Tyson picked him up and took him to the hospital. Defendant was not the person who shot him. While Rudy was in the hospital, he was asked by an officer if he knew defendant and defendant's brother Raul Albor. He told the officer that he did but never told the officer defendant had shot him. He never told Riverside County Sheriff's Corporal Robert Navarrete that defendant shot him. He acknowledged he circled defendant's picture on a six-pack photographic lineup shown to him by Navarrete but only because he knew defendant, not because defendant shot him.

Rudy's recorded interview with Corporal Navarrete while he was still in the hospital was played for the jury. Rudy and Tyson went to meet with defendant to buy

drugs. Rudy parked and defendant parked behind him. Rudy and defendant exited their vehicle and met halfway between the vehicles. A.R. was there and spoke with Tyson. Defendant and Rudy entered defendant's truck. Defendant showed him some "dope" but it was not very much. Defendant took Rudy's money. Defendant told him A.R. had more drugs and they exited the truck. Rudy then indicated defendant "started tripping" and talking bad about him. Rudy asked him "what the fuck" he was talking about and stepped toward defendant. Defendant pulled out a gun. Rudy told him "You don't fucking pull one out, you'd fucking better bust it." Defendant put the gun to Rudy's chest. Defendant shot Rudy.

Rudy did not know why he told Corporal Navarrete that defendant shot him except that he was on medication and there were a lot of things happening that day. Rudy insisted that when he first spoke with Navarrete, he told him someone he did not know walked up to him and shot him. Rudy denied that he had ever been contacted by defendant or anyone else and told to lie in court.

L.R. had two children with Rudy. Rudy told her several versions of what had occurred when he was shot. He identified several people as shooting him. Rudy also said a random person on the street walked up and shot him. L.R. spoke with Corporal Navarrete at the hospital; the recorded interview was played for the jury. She told him Rudy had circled defendant's picture as the person who shot him. Rudy told L.R. that defendant was with "A.R." and "Christina."

Corporal Navarrete was in charge of the investigation into Rudy's shooting. Navarrete went to the location of the shooting and found a .22-caliber shell casing. A gun was never found.

Rudy first told Corporal Navarrete at the hospital that he was meeting a person named Robert that day. A truck pulled up and Robert and two other people were in the truck. A man with Robert exited the truck and asked him if he was Rudy. When Rudy said yes, the man shot him. Rudy later told Navarrete that he had been walking on the street and a random person came up and shot him.

Corporal Navarrete discovered defendant may have been involved. When he asked Rudy, Rudy's demeanor changed. Rudy then told Navarette that defendant shot him. Rudy chose defendant's photograph from the six-pack photographic lineup. L.R. told Navarrete at the hospital that Rudy told her defendant shot Rudy.

Video surveillance from the area of the shooting showed the truck. The truck belonged to A.R. When it was later located, it had been sanded in preparation for it to be painted. Corporal Navarrete interviewed A.R. at the police station in Moreno Valley on July 7, 2012. A.R. told him that he heard a gunshot but he was not sure if defendant shot Rudy or just up into the air. A.R. also said he never saw a gun that day even though he heard a gunshot.

The parties stipulated that Rudy suffered a single gunshot wound to his upper chest. There was an entrance wound but no exit wound. The parties also stipulated that defendant had a prior conviction for receiving stolen property.

Defendant made a phone call from jail to Raul, which was recorded and played for the jury. Defendant told Raul to "[s]end him a message and let him know that whenever they ask him to show up to uh, to court to show up but for him to say the truth and say that uh, the only reason he circled the picture that he circles in the thing was because the cops pressured him into doing it." Raul asked "circles what?" Defendant responded the lineup and that it was because the police made him and scared him. Further, if he was asked in court if he recognized anyone from the day he was shot, he was to say no. Defendant stated, "And if he, if he does that then he'll be okay and nobody will have—he won't have to worry about being in the streets or nothing." Defendant commented, "I think that the person that uh, fucked it all up was his baby's mom. Fool she's the one that whatever the fuck she said was because she heard it from somebody."

Defendant told Raul to get "him" the message. Defendant told Raul, "So beside what I'm asking you tell him if he does anything different than that then every time he gets busted he's gonna get fuckin' beat up." Defendant told Raul that Rudy had to show up to court or there would be a warrant issued for Rudy's arrest; however, when Rudy testified he had to say he was under the influence of drugs and the police had pressured him. Rudy was not to identify defendant in court.

Defendant testified on his own behalf. He acknowledged he met with Rudy to sell him drugs and that he was with A.R. and Christina. Defendant and Rudy got into a fight. Rudy had a gun. Defendant pushed him away and at that point the gun went off. Defendant admitted he was talking to his brother Raul on the recording of his phone conversation while in jail. Defendant wanted Raul to tell Rudy to "come clean" and tell

the truth about what had happened. He did not intend to have Rudy lie during his testimony. Defendant denied that he carried a gun.

2. *SECOND TRIAL*

Rudy testified at the second trial. Rudy admitted that in July 2012, he was addicted to methamphetamine. On that day, Rudy was with Tyson. Rudy wanted to buy methamphetamine.

Rudy grew up with defendant in Moreno Valley. Rudy and defendant's brother Raul had been best friends in middle school and had stayed in touch off and on after middle school. Rudy had not seen defendant for several years but knew he sold methamphetamine. He set up a meeting with defendant to buy methamphetamine.

They met on a residential street. Defendant was with several other people. A friend dropped Rudy off. He was not sure if the people with defendant were Christina and A.R. Defendant and Rudy spoke on the street. They entered defendant's vehicle. Rudy gave defendant $100 and defendant gave Rudy methamphetamine; it was less than Rudy expected to get. They got into an argument. Defendant told Rudy he would get him more methamphetamine.

They both exited the vehicle and started fighting. Rudy threw at least five punches. Neither of them had a gun. Someone yelled for them to go and defendant and the others left. Rudy was left on the street and needed a ride. Tyson was at a nearby house. While Rudy was on the street, someone drove up in a truck and got out. The person asked if he was Rudy. When Rudy said yes, he was shot by this unknown person in the chest. Tyson found Rudy and took him to the hospital.

Rudy did not recall that he told the police defendant had shot him. Rudy could not remember telling the police that he was shot by someone named Robert. Rudy's police interview (set forth *ante*) was played for the jury.

Rudy did not recall circling defendant's photograph in the photographic lineup. When shown the photographic lineup, he said defendant was not the person who shot him. He circled him because he knew him.

L.R. testified that Tyson had called her and told her Rudy had been shot. L.R. went to the hospital. Rudy told her that defendant shot him but he was very indecisive and changed his mind about who shot him. Her taped interview (set forth *ante*) was played for the jury. L.R. stated that she was high on drugs during that time and did not remember much of that time.

Hermanson again testified that she was outside her home when she saw two cars, one of which was a truck, parked on the street. There were several males and a female in the vehicles. She heard a "pop." The vehicles then sped off. She never saw anyone fighting.

The jail call between defendant and Raul (set forth *ante*) was played for the jury.

Christina testified that defendant arranged that day to meet Rudy to sell him drugs. They drove to meet him in A.R.'s truck. They parked on a residential street. Defendant and Rudy entered the truck while she smoked a cigarette outside. She observed them exchange money for drugs. Rudy was not happy about the amount of drugs he was given. They exited the truck and started arguing. Rudy threw a punch at defendant. She

heard a gunshot. Defendant got back in the truck and said that they had to get out of there. Defendant said as they drove that he thought he "got" or "shot" Rudy in the neck.

Christina had seen a gun at A.R.'s shop where they were together doing drugs prior to the shooting. She never saw defendant with the gun. She never saw a gun in the truck. She did not see a gun when they got back in the truck. Defendant was probably wearing baggy clothes and his waistband was covered.

A.R. admitted he was with Christina and defendant on July 2. They met Rudy on a residential street in Moreno Valley. He observed defendant and Rudy get into a fight. A.R. never saw a gun. A.R. denied he ever heard a gunshot. They drove off. Rudy did not appear to have been shot. He never saw defendant with a gun.

Corporal Navarrete testified at the second trial. Navarrete went to the hospital to speak with Rudy. Rudy initially said he was shot by a person named Robert. The third time he interviewed Rudy, Navarrete mentioned defendant's name and Rudy's demeanor changed. Rudy then said that defendant shot him. Rudy told him where the shooting occurred. Navarrete went to that location and found a shell casing.

Rudy told Corporal Navarrete that he and defendant got into an argument over the amount of drugs. They started to get into a fighting position and then defendant pulled out a gun from either his waistband or back pocket and shot him. Rudy clearly identified defendant from the six-pack photographic lineup as the person who shot him. He also identified A.R. and Christina as being present. Navarrete spoke with L.R. at the hospital. Rudy told her defendant shot him. He spoke with A.R.; A.R. heard a gunshot. Christina and A.R. never told Navarrete that defendant and Rudy had gotten into a physical fight.

Christina told him that defendant said "I shot that fool in the neck" when he got back in the truck. Defendant did not testify.

The parties stipulated that Rudy was seen at the hospital for a single gunshot wound and that there was an entrance wound but no exit wound. They also stipulated as follows: "It is stipulated by and between the parties that the defendant . . . has previously been found guilty of willfully and unlawfully, knowingly and maliciously, preventing and dissuading Rudy from attending and giving testimony at an inquiry and proceeding authorized by law." In addition, they stipulated that defendant "has previously been found guilty of unlawfully owning and having in his possession and under his custody a handgun on July 2nd 2012."

DISCUSSION

A. DISSUADING A WITNESS

Defendant makes three related claims as to why his dissuading a witness conviction should be reversed. Initially, he contends that the evidence presented was insufficient to support the verdict because he did not knowingly and maliciously seek to prevent Rudy from testifying at his trial. Rather, defendant encouraged Rudy to attend the trial and tell the truth. In addition, defendant contends that his trial counsel was ineffective for conceding his guilt of the charge at the first trial. Finally, he contends that the instruction to the jury on dissuading a witness, CALCRIM No. 2622 was improperly modified by the trial court and was incorrect.

We will first address the sufficiency of the evidence. "In addressing a challenge to the sufficiency of the evidence supporting a conviction, the reviewing court must

examine the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence—evidence that is reasonable, credible and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citation.] The appellate court presumes in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence." (*People v. Kraft* (2000) 23 Cal.4th 978, 1053; see also *People v. Farnam* (2002) 28 Cal.4th 107, 142-143.)

Section 136.1, subdivision (a)(1) provides that "[A]ny person who does any of the following is guilty of a public offense and shall be punished by imprisonment in a county jail for not more than one year or in the state prison: [¶] (1) Knowingly and maliciously prevents or dissuades any witness or victim from attending or giving testimony at any trial proceeding, or inquiry authorized by law."

Section 137, subdivision (c) provides, "Every person who knowingly induces another person to give false testimony or withhold true testimony not privileged by law or to give false material information pertaining to a crime to, or to withhold true material information pertaining to a crime from, a law enforcement official is guilty of a misdemeanor."

"The entire sense of Penal Code section 137 is that testimony will be given, but the perpetrator will attempt to influence the testimony given. This is clear from a comparison of the language of sections 136.1 and 138. Section 138 punishes anyone 'who gives or offers or promises to give to any witness or person about to be called as a witness, any bribe upon any understanding or agreement that the person shall not attend

upon any trial or other judicial proceeding, or . . . who attempts by means of any offer of a bribe to dissuade any person from attending upon any trial or other judicial proceeding.' [] Section 136.1 punishes anyone who "[k]nowingly and maliciously prevents or dissuades any witness or victim from attending or giving testimony at any trial, proceeding, or inquiry authorized by law " or from attempting to do so. [] These sections clearly contemplate that the perpetrator will prevent or dissuade a prospective witness from giving testimony, or will attempt to do so. Preventing or dissuading a witness from testifying altogether is incompatible with influencing or shaping the testimony the witness gives." (*People v. Womack* (1995) 40 Cal.App.4th 926, 930-931, Italics omitted.)

In *People v. Fernandez* (2003) 106 Cal.App.4th 943, the defendant took his friend's disability check, forged his friend's signature and cashed the check. The defendant was charged with fraud and a preliminary hearing was set. The defendant convinced his friend to sattend the hearing but told him how he should testify. (*Id.* at pp. 945-946.) The defendant was convicted of violating section 136.1, subdivision (b)(1).[4] On appeal, the defendant argued that he could not be convicted of violating section 136.1 based on his efforts to dissuade his friend from giving truthful testimony at the

[4] Section 136.1, subdivision (b)(1) provides, "[E]very person who attempts to prevent or dissuade another person who has been the victim of a crime or who is witness to a crime from doing any of the following is guilty of a public offense and shall be punished by imprisonment in a county jail for not more than one year or in the state prison: [¶] (1) Making any report of that victimization to any peace officer or state or local law enforcement officer or probation or parole or correctional officer or prosecuting agency or to any judge."

preliminary hearing. He acknowledged his actions violated section 137 but that the People charged him with the wrong statute. (*Fernandez*, at p. 947.)

The appellate court agreed. It noted, "[A]n effort to influence the contents of a victim's or witness's preliminary hearing testimony is governed by section 137, and an effort to prevent a victim or witness from testifying entirely is governed by sections 136.1, subdivision (a) and 138, subdivision (a). Section 136.1, subdivision (b)(1) should not be construed to punish efforts to prevent or influence testimony when it does not do so expressly, and there are other statutes within the same scheme that cover such conduct." (*People v. Fernandez*, *supra*, 106 Cal.App.4th at pp. 949-950.) It further noted, "The distinction between the offenses is not merely a semantic one. The Legislature has taken pains to distinguish the various methods of influencing a witness and to establish a range of punishment for those offenses that reflects different levels of culpability. Efforts to influence the contents of a witness's testimony are generally punishable as misdemeanors. [Citation.] Efforts to prevent a defendant from reporting a crime or from appearing in court are punished more severely, either as wobbler offenses, alternatively punishable as misdemeanors or felonies, or as straight felonies.)" (*Id.* at pp. 950-951.) The appellate court reversed the conviction even though the evidence supported a conviction under section 137, subdivision (c). (*Fernandez*, at p. 951.)

Here, defendant advised Raul to tell Rudy to come to court but to refuse to identify defendant, and testify that Rudy had been under the influence of drugs at the hospital. While there is no doubt that defendant violated section 137, subdivision (c) by calling Raul to get him to advise Rudy to lie in court, his actions do not constitute a violation of

section 136.1. Defendant was charged with a violation of section 136.1, subdivision (a)(1), which required him to influence another to not testify. The evidence does not support a violation of section 136.1, subdivision (a)(1).

The People allege there was sufficient evidence of a violation of section 136, subdivision (a)(1) because "substantial evidence permitted the jury to reasonably conclude appellant had both intents: to influence Rudy to testify falsely or, in the alternative, to dissuade him from testifying altogether." The People insist the evidence established that defendant intended to dissuade Rudy from testifying if he would not commit perjury. The evidence does not support such a conclusion. At no time did defendant tell Raul that Rudy should not come to court. In fact, defendant advised Raul that if Rudy did not come to court, he would be arrested. The evidence simply does not support defendant's conviction of section 136.1, subdivision (a)(1). Since we reverse his conviction, we need not address the claims of ineffective assistance of counsel and instructional error related to this issue.

B. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant claims he received ineffective assistance of counsel in violation of his Sixth Amendment rights because his counsel stipulated to the facts he had been found guilty in a prior proceeding of dissuading Rudy to testify, and that he had been convicted of being a felon in possession of a firearm on July 2. He also contends that his counsel should have requested a limiting instruction.

1. *ADDITIONAL FACTUAL BACKGROUND*

Prior to the second trial, both counsel were informed by the trial court not to mention that there was a prior hung jury. They were to refer to the first trial as "prior proceeding" or "prior hearing." The prosecutor inquired of the trial court about the jail call. The prosecutor asked, "He was convicted of 136 on the previous trial. How did the Court want to handle that? Because I don't want to relitigate it, but it's obviously evidence of his guilt, and that actually happened. Do we want to do that by stipulation?" The trial court asked defense counsel if they had discussed a stipulation and he responded that they had not. The prosecutor stated, "[t]he fact that he was convicted of dissuading a witness is going to be coming in." The trial court responded, "Okay. [¶] Certainly relevant prior conduct." The trial court further noted, "You decide how it's relevant, it's germane to the issue, particularly with the witness problems you all are having. You are going to have to say something, unless these guys all come in here and roll over on [defendant]. You are going to have something to say about it."

At the next hearing, the trial court indicated it had received three stipulations and the parties agreed they would be read at the end of trial. There was no further discussion of the stipulations. At the end of the People's case, as set forth *ante*, the jury was read the stipulations that defendant had been convicted of preventing and dissuading Rudy from attending and giving testimony at an inquiry or proceeding authorized by law, and that defendant had been previously found guilty of unlawfully owning and having in his possession a handgun on July 2. The jury was also instructed that they could consider evidence that defendant discouraged someone from testifying against him as conduct that

he was aware of his guilt. The jury was given a general limiting instruction that certain evidence was admitted for a limited purpose. The jury was advised to consider the evidence only for that purpose and for no other.

2. *ANALYSIS*

To prevail on an ineffective assistance of counsel claim, defendant must establish trial counsel's representation fell below professional standards of reasonableness and must affirmatively establish prejudice. (*Strickland v. Washington* (1984) 466 U.S. 668, 687.) "In the usual case, where counsel's trial tactics or strategic reasons for challenged decisions do not appear on the record, we will not find ineffective assistance of counsel on appeal unless there could be no conceivable reason for counsel's acts or omissions." (*People v. Weaver* (2001) 26 Cal.4th 876, 926; see also *People v. Earp* (1999) 20 Cal.4th 826, 896.)

"If the record on appeal sheds no light on why counsel acted or failed to act in the manner challenged, an appellate claim of ineffective assistance of counsel must be rejected unless counsel was asked for an explanation and failed to provide one, or there simply could be no satisfactory explanation." (*People v. Gray* (2005) 37 Cal.4th 168, 207; *People v. Hinds* (2003) 108 Cal.App.4th 897, 901.) "A claim of ineffective assistance in such a case is more appropriately decided in a habeas corpus proceeding." (*People v. Mendoza Tello* (1997) 15 Cal.4th 264, 267-268.)

Here, the record clearly establishes the reason that defense counsel stipulated to the admission of defendant's conviction for dissuading a witness, despite defendant's claim on appeal that the stipulation had no benefit. The jail call was found admissible by

the trial court on the independent ground that it showed defendant's consciousness of guilt. Certainly, defense counsel would not want the jury to find defendant guilty of the attempted murder because defendant could potentially go unpunished for encouraging his brother to tell Rudy to lie for him. Defendant's trial counsel made a reasonable tactical decision to inform the jury that defendant had already been punished for attempting to influence Rudy's testimony. Moreover, the admission was not prejudicial. (*Strickland v. Washington*, *supra*, 466 U.S. at p. 687.) The jury heard the jail call in which defendant talked to his brother. They could determine on their own that defendant tried to keep Rudy from testifying that defendant was the shooter. Moreover, even though we have concluded on appeal that the evidence did not support defendant's conviction pursuant to section 136, subdivision (a)(1), the evidence of the jail call was still admissible to show consciousness of guilt. The jury was properly instructed that it could consider this evidence for the purpose of showing his consciousness of guilt. Defendant's claim that the jury believed there was evidence other than the jail call to support his conviction is pure speculation. Defendant's claim of ineffective assistance of counsel on this ground fails.

However, the record does not establish why defendant's trial counsel stipulated to the admission of defendant's felon in possession of a firearm finding in the first trial and why counsel did not request a limiting instruction on the use of the evidence of the prior possession of a firearm finding. The parties did not discuss the stipulation on the record and defendant's counsel cross-examined each of the witnesses as to whether they ever saw defendant with a gun the day of the shooting. Defendant did not testify at the second

trial and there is no discussion in the record why defense counsel stipulated to the conviction. Defendant has argued that the conviction was not admissible at the second trial and the People have not addressed under what theory the prior conviction could have been admitted.

As stated *ante*, "we will not find ineffective assistance of counsel on appeal unless there could be no conceivable reason for counsel's acts or omissions." (*People v. Weaver*, *supra*, 26 Cal.4th at p. 926.) A satisfactory explanation for why defense counsel chose to stipulate to the admission of the possession of a firearm finding in the first trial may exist. For example, counsel may have wanted the jury to infer that a prior jury could not reach a verdict on the attempted murder charge even after finding he was in possession of a firearm. As for the instructions, trial counsel may have felt the instructions were adequate. This issue is more properly addressed in a habeas corpus proceeding and we reject the claim on direct appeal.

C. GBI ENHANCEMENT

Defendant contends the trial court improperly imposed a consecutive sentence on the section 12022.7 GBI enhancement because it imposed a sentence of 25 years to life on the section 12022.53, subdivision (d) enhancement. We agree that the sentence could not be imposed and that it should have been stayed. However, we disagree that we must strike his conviction of the enhancement pursuant to section 12022.7 because it is a lesser included enhancement of section 12022.53, subdivision (d).

At sentencing, the trial court stated, "With respect to the discharging of a firearm in the commission of that attempted murder, the sentence is mandatory 25 years to life.

[¶] And with respect to the GBI enhancement, the sentence is three years. Each of those are to run consecutive to the count—the Count 1 sentence."

Section 12022.7, subdivision (a) provides "Any person who personally inflicts great bodily injury on any person other than an accomplice in the commission of a felony or attempted felony shall be punished by an additional and consecutive term of imprisonment in the state prison for three years." Section 12022.53, subdivision (d) provides for an additional 25-years-to-life penalty for the use of a firearm causing great bodily injury during the commission of attempted premediated murder. (*People v. Gonzalez* (2008) 43 Cal.4th 1118, 1124. (*Gonzalez*).)

Section 12022.53, subdivision (f) provides, in part, that "[o]nly one additional term of imprisonment under this section shall be imposed per person for each crime. If more than one enhancement per person is found true under this section, the court shall impose upon that person the enhancement that provides the longest term of imprisonment. . . . An enhancement for great bodily injury as defined in *Section 12022.7*, 12022.8, or 12022.9 shall not be imposed on a person in addition to an enhancement imposed pursuant to subdivision (d)." (Italics added.)

Defendant was sentenced to 25 years to life on the section 12022.53, subdivision (d) allegation. As such, pursuant to section 12022.53, subdivision (f), he could not be sentenced on the section 12022.7 enhancement. The trial court should have stayed the sentence on the section 12022.7 enhancement. We will order that the sentence be stayed.

Defendant argues that this court should order the trial court to strike the section 12022.7 enhancement because it is a lesser included enhancement of section 12022.53,

subdivision (d). Enhancements are not crimes and thus, one enhancement cannot be a lesser included offense of another enhancement. (*People v. Manning* (1992) 5 Cal.App.4th 88, 90-91 [courts have no legal obligation to strike a jury's true finding on an enhancement on grounds it was a "lesser enhancement" of another]; see also *People v. Majors* (1998) 18 Cal.4th 385, 410-411 [no duty to instruct on one enhancement as a "lesser included enhancement" of another because a sentence enhancement is not the equivalent of a substantive offense].) Moreover, the Supreme Court in *Gonzalez, supra*, made it clear that it rejected any interpretation of the language in section 12022.53, subdivision (f) that would have the trial court strike, rather than stay, multiple firearm use enhancements. (*Gonzalez, supra,* 43 Cal.4th at pages 1127 through 1128.)[5]

We will order the trial court to stay the section 12022.7 enhancement.

D. SECTION 654

Defendant contends the trial court erred by failing to stay the sentence on his felon in possession of a firearm conviction pursuant to section 654 because the evidence presented showed that he only possessed the gun in conjunction with the primary offense of attempted premediated and deliberate murder.

In sentencing defendant on the felon in possession of a firearm charge, the trial court did not state its reasoning for imposing a consecutive sentence. It did note that it had reviewed the probation report. In the probation report, it was noted "The defendant

[5] Defendant contends that in *Gonzalez*, the Supreme Court did not consider great bodily injury enhancements under sections 12022.7 and 12022.53, subdivision (d). We see no reason to distinguish the personal use of a firearm causing great bodily injury enhancements from the use of a firearm enhancements discussed in *Gonzalez*.

was not merely in possession of a firearm when he shot the victim; he was in possession of said firearm before and after the offense in Count 1 occurred. Therefore, Count 2 is not purely incidental to Count 1, and sentencing limitations pursuant to Section 654 do not exist."

Section 654, subdivision (a), provides: "An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision."

" 'Whether a violation of section 12021, forbidding persons convicted of felonies from possessing firearms concealable upon the person, constitutes a divisible transaction from the offense in which he employs the weapon depends upon the facts and evidence of each individual case. Thus where the evidence shows a possession distinctly antecedent and separate from the primary offense, punishment on both crimes has been approved. On the other hand, where the evidence shows a possession only in conjunction with the primary offense, then punishment for the illegal possession of the firearm has been held to be improper where it is the lesser offense.' " (*People v. Bradford* (1976) 17 Cal.3d 8, 22.) "[S]ection 654 is inapplicable when the evidence shows that the defendant arrived at the scene of his or her primary crime already in possession of the firearm." (*People v. Jones* (2002) 103 Cal.App.4th 1139, 1145.) "[I]f the evidence demonstrates at most that fortuitous circumstances put the firearm in the defendant's hand only at the instant of committing another offense, section 654 will bar a separate punishment for the

possession of the weapon by an ex-felon." (*People v. Ratcliff* (1990) 223 Cal.App.3d 1401, 1412.)

Here, the evidence reasonably supports that defendant was in possession of the gun prior to and after the shooting. Defendant and Rudy were standing with each other on the street. They got into an argument and suddenly defendant pulled a gun on Rudy. No testimony established that defendant was handed the gun; that he miraculously found it on the ground, or that the gun appeared from thin air. Rather, the reasonable interpretation of the evidence was that defendant had the gun on his person prior to the argument with Rudy. Moreover, no gun was discovered at the scene despite the area being searched by Corporal Navarrete. As such, the trial court reasonably imposed the sentence on the felon in possession of a firearm conviction as defendant possessed the gun both prior to and after the shooting.

D. REPLACEMENT OF RETAINED COUNSEL AT SENTENCING

Defendant contends the trial court erred by failing to further inquire if he wanted to replace his retained counsel, Michael Schaaf, for sentencing.

Prior to sentencing, the trial court stated that it had read the probation report and asked if either party wanted to make a statement prior to sentencing. Defendant responded, "I have a—I want something to be put on the record, Your Honor. I just want to let the Court know that Mr. Schaaf, my lawyer, never once visited me throughout the whole time since he was hired in the jail to talk about the case. I didn't have a number to get ahold of him to talk about the case. The only time we did talk about the case was when the trial actually started. [¶] And the last thing I want to bring up is I wasn't aware

of the firearm from the prior convictions being brought up so many times on the trial. I didn't know that was going to be allowed. [¶] So when he asked me if I wanted to get on the stand, he advised me—he said from him that it wasn't—."

The trial court interrupted, "Hang on. If I could stop you. I am not sure that you want to start telling us things that were communications between you and your lawyer. Those are protected privileges and there might be some individuals who think you are waiving the attorney-client privilege by talking about that. [¶] Now, I am willing—hang on, I am willing to listen to anything you have to say, but I would highly recommend that you seek counsel from Mr. Schaaf as to whether or not he has anything to say about you relating conversations you have had with your attorney here in court with the prosecutor present and being on the record."

Defendant responded that he wanted to finish what he was saying. Defendant then told the trial court, "That's the reason why I didn't get on the stand was because I wasn't aware that they were going to bring up the conviction of the gun so many times. [¶] The last thing is I would want the Court to ask Mr. Schaaf to help me with my appeal, and if I can get all my court transcripts." The trial court advised defendant that it was not sure that Schaaf would remain as his attorney but he would be given counsel who would assist him. The trial court advised defendant it could not order Schaaf to do anything. Schaaf stated he had advised defendant he would be filing a notice of appeal.

The trial court asked if there was anything else that defendant wanted to say. Defendant responded, "That was it." The trial court noted in explaining the sentence that

it found it "disturbing" that defendant appeared to blame Schaaf. However, Schaaf was not a magician and could not change the facts.

Defendant was entitled to discharge his retained counsel without cause upon a timely request. (*People v. Ortiz* (1990) 51 Cal.3d 975, 983-984, 987.) However, he had to make "at least some clear indication . . . that he wants a substitute attorney." (*People v. Lucky* (1988) 45 Cal.3d 259, 281, fn. 8.) Defendant never impliedly or explicitly requested to discharge his counsel. In fact, defendant asked that Schaaf help him with his appeal. No further inquiry was required by the trial court.

DISPOSITION

We reverse defendant's conviction of violating section 136.1, subdivision (a)(1) on count 3. The trial court is directed to stay the three-year sentence on the section 12022.7 great bodily injury enhancement. The trial court is further directed to correct the sentencing minute order and forward a copy of the corrected abstract of judgment to the Department of Corrections and Rehabilitation. We otherwise affirm the judgment.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

MILLER
J.

We concur:

RAMIREZ
P. J.

SLOUGH
J.